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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No.

CITY OF COLTON, CALIFORNIA,

Petitioner,

v.

SOUTHERN CALIFORNIA EDISON COMPANY and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, the City of Colton, California (hereinafter referred to as "Colton"), respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this case on November 15, 1962.

Opinions Below

The opinions of the Court of Appeals for the Ninth Circuit are not yet reported. They are printed in Appendix A, p. 17, of the Federal Power Commission's petition for a

writ of certiorari,[1] also filed in this case. The orders of the Federal Power Commission (R. 839-869, 892-897) are reported in 26 F. P. C. 223 and 492 (1961). The record has been filed in support of the F. P. C. Petition for Certiorari.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 15, 1962 (F. P. C. Pet. for Cert., App. B, p. 42). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and Section 313(b) of the Federal Power Act, 16 U. S. C. 825*l*(b).

Question Presented

Whether the Commission's jurisdiction under Section 201(b) of the Federal Power Act over a "sale of electric energy at wholesale in interstate commerce" is (a) limited to cases where there is "an interstate conflict of interest . . . prominent on the facts", or (b) is precluded by Section 6 of the Boulder Canyon Project Act of 1928 as to electric energy originating at power installations constructed under that act.

Statute Involved

The pertinent provisions of the Federal Power Act, 41 Stat. 1063, as amended, 16 U. S. C. §§ 791-825(r), are set out in the F. P. C. Pet. for Cert., App. C, p. 44. A corresponding provision of the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. §§ 717-717(w), which is involved in closely related cases, is also set out in the F. P. C. Pet. for Cert., App. C, p. 48.

Section 6 of the Boulder Canyon Project Act of 1928, 45

[1] No. 808, October Term, 1962, hereinafter referred to as "F.P.C. Pet. for Cert.".

Stat. 1057, 1061-1062, 43 U. S. C. § 617(e), is set out in App. A, *post*, p. 11.

Statement

The issue of the Commission's jurisdiction over the sale of electric energy by the Southern California Edison Company (hereinafter referred to as "Edison") to Colton, although in question since at least August 31, 1953, was brought to a head when Colton filed a petition on May 8, 1958, with the Commission. In its petition Colton requested the Commission to find that Edison's sale to Colton under a 1945 contract was a sale for resale involving interstate electric energy; that the contract was, therefore, required to be filed by Edison as a rate schedule under the Federal Power Act; that Edison was violating the Federal Power Act in failing to file the contract and in demanding and collecting rates since September 13, 1954, in excess of the rates specified in the contract; and to grant relief accordingly (R. 1674-1679).

Colton adopts, without repetition, the "Statement" of the Commission's petition for a writ of certiorari in which the circumstances giving rise to Colton's complaint, the proceedings before the Commission, the Commission's findings, and the decision of the court below are detailed.

One facet of this case, however, which weighs heavily on Colton and the consumers it serves, but does not affect the Commission, should be elaborated. As stated by the Commission in its petition, Edison was directed to file the 1945 contract as its effective rate schedule governing the sale to Colton and was also directed to cease and desist from charging any rate in excess of the rate originally fixed in the contract unless and until such rate might be lawfully changed in accordance with the procedures set forth in Section 205(d) of the Federal Power Act.

Edison complied by filing the 1945 contract as its legally

effective rate schedule for the sale of electric energy to Colton. Immediately, however, Edison filed an increase in its rate to Colton which was 60 percent in excess of the rate specified in the 1945 contract and 35 percent in excess of the rate Edison had been charging Colton before the Commission asserted its jurisdiction.

The Commission, by order issued December 28, 1961, suspended the increased rate for the maximum period of five months allowed by the Federal Power Act, pending investigation and hearing as to its reasonableness (*Southern California Edison Company*, Docket No. E-7019), but because of the challenge to the legality of its order in this case, the proceeding has been dormant. In the meantime, however, the suspension period has expired and since June 1, 1962, Colton, in accordance with the Act, has been required to pay the new rates, 35 percent above those originally complained of, albeit doing so subject to refund.

Notwithstanding the right to refunds when the Commission has decided the question of the reasonableness of the increased rate, the necessity of making such payment presently imposes a severe financial burden and hardship on Colton and its consumers and is of continuing detriment.[2]

In the circumstances, the earliest possible termination of this litigation is urgently required and is of the utmost importance to Colton and its consumers. *cf. Federal Power Commission* v. *Tennessee Gas Transmission Company*, 371 U. S. 145, 154 (1962).

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[2] Even if during the continuation of the litigation Colton were to cease payment of the increased rates and revert to payment of the 1957 State rate, Colton is still faced by the same financial burden of the new rate because it would still have to create a reserve, representing the difference between the two rates, in order to provide for the contingent liability.

Reasons for Granting the Writ

Colton adopts and does not repeat the reasons for granting the writ advanced by the Commission. Indeed, the decision of the court below is so patently erroneous that, Colton submits, this case is one where summary reversal on the issue decided by the court below is appropriate.

1. A clear conflict exists between the circuits. The holding of the court below is in direct conflict with *Wisconsin* v. *Federal Power Commission*, 201 F. 2d 183 (1952), certiorari denied, 345 U. S. 934 (1953), a decision of the United States Court of Appeals for the District of Columbia Circuit which the court below does not discuss, although the facts are the same and although in that case the same contention accepted by the court below, was rejected by the D.C. Circuit.

In the *Wisconsin* case, *supra*, Wisconsin Power and Light Company purchased energy generated in Illinois at the Illinois-Wisconsin boundary. The out-of-state energy so purchased was transmitted by Wisconsin Power from the state line, over its own facilities, to the city limits of four municipalities. At the city limits the electric energy was metered, delivered and sold to the municipalities for distribution over their respective distribution systems. Prior to delivery of the electric energy, the voltage of the electric energy was reduced by Wisconsin Power, and, after delivery, was further reduced by the municipalities to retail distribution voltage.

Thus, a complete parallel exists between the *Wisconsin* case and this one with regard to (1) the existence of an initial sale which is admittedly beyond the power of the state to regulate, (2) the existence of a subsequent or second sale for resale which takes place wholly within the boundaries of a single state, (3) the existence of a state

regulatory commission which has for years purported to regulate the rate for the subsequent or second sale and claims jurisdiction, and, (4) the movement of the electric energy after the initial sale, including the reduction in voltage and the sale, delivery and metering of the electric energy at the city limits of the municipalities.

In the *Wisconsin* case, the Commission, after finding that the sales for resale to the municipalities were subject to its jurisdiction, ordered Wisconsin Power to file the rate schedules. On review, Wisconsin Power, like Edison, contended that Commission jurisdiction did not attach to the subsequent or second sales because the Commission had made no finding that the sales were "national in character". This contention was rejected. The D.C. Circuit ruled that no such finding is necessary and that under Part II of the Act where "interstate transmission is involved, *the controlling distinction is between wholesale and retail sales*" (202 F. 2d at 185, note 1). (Italics supplied) No clearer conflict between courts of appeals could be presented.

But there is not only thus, an inter-circuit conflict; the precise issue has already been resolved by this Court, so clearly contrary to the decision below as to warrant summary reversal. In *Illinois Natural Gas Company* v. *Central Illinois Public Service Company*, 314 U. S. 498 (1942), which arose under the parallel provisions of the Natural Gas Act.[3] In *Illinois Natural*, the jurisdictional controversy also related to a sale at wholesale within a state after an initial sale admittedly in interstate commerce and subject to regulation by the Federal Power Commission. The

[3] Although this case involved the Natural Gas Act, this Act is a companion statute to Parts II and III of the Federal Power Act. The courts have uniformly applied decisions involving interpretation of the Gas Act to the Power Act, and vice versa. In *FPC* v. *Arizona Edison Co.*, 194 F. 2d 679, 682, (9th Cir. 1952), it was stated that ". . . the key statutory language is almost identical. . . ."

facts as to movement, pressure, and sale of the natural gas in *Illinois Natural* parallel the facts as to the movement, voltage, and sale of the electric energy by Edison to Colton. This is not denied by the court below in its discussion of this case. The court below, however, attempts a distinction of the present case and *Illinois Natural* on two grounds.

First, it asserts (F. P. C. Pet. for Cert., App. A, p. 31) that state commission jurisdiction was denied because the proposed extension of *Illinois Natural's* facilities ordered by the state commission " 'is so intimately associated with the commerce, and would so affect its volume moving into the state and distribution among the states, as to be within the Congressional power to regulate those matters which materially affect interstate commerce, as well as the commerce itself,' 314 U. S. 498, 509." Second, it asserts (F. P. C. Pet. for Cert., App. A, p. 32, note) that *Illinois Natural* did not deal with rates at which power is sold, but with the regulation of other matters "over which the scope of federal authority is broader because of the specific federal interests and statutory provisions involved."

The attempted distinctions are invalid. They ignore the fact—so plain from a mere reading of *Illinois Natural*—that this Court's ruling in favor of federal jurisdiction was based on a determination that it was not necessary to balance local against national interests in each case in order to resolve the jurisdictional question as between state commissions and the federal commission, because the federal statute had defined the jurisdiction of the Federal Power Commission in simpler terms. Thus, this Court said (314 U. S. at 506-507, 508).

> "In the absence of any controlling act of Congress, we should now be faced with the question whether the interest of the state in the present regulation of the sale and distribution of gas transported into the state,

balanced against the effect of such control on the commerce in its national aspect, is a more reliable touchstone for ascertaining state power than the mechanical distinctions on which appellee relies. But we are under no necessity of making that choice here, for Congress, by the Natural Gas Act, has brought under national control the very matters which the state has undertaken to regulate by the order.

"An avowed purpose of the Natural Gas Act . . . was to afford, through the exercise of the national power over interstate commerce, an agency for regulating the wholesale distribution to public service companies of natural gas moving interstate, which this Court had declared to be interstate commerce not subject to certain types of state regulation. . . . By its enactment, Congress undertook to regulate a defined class of natural gas distribution, *without the necessity, where Congress has not acted, of drawing the precise line between state and federal power by the litigation of particular cases.* . . .

"We think it plain that these provisions [of Sections 1(b), 2(b), 4, 5, 6, 7(a), 7(b), 7(c)], read in the light of the legislative history, were intended to bring under federal regulation wholesale distribution, like that of appellant, of gas moving interstate. . . . After the gas is brought into the state, appellant makes the first sale to distributors for resale, *to which the Act in terms applies*, and which the cases last mentioned defined as a part of the commerce subject in some respects to the exclusive regulation of Congress. . . ." (italics and material in brackets supplied).

2. In the event that the petition for a writ of certiorari is granted without summary reversal despite the clear conflict between the decision of the court below and this Court's de-

cision, Colton will, in that event, urge that the full scope of Section 201(b) of the Federal Power Act in respect to its relation to the nation-wide regulatory scheme envisioned by Congress, and with specific reference to Section 6 of the Boulder Canyon Project Act be decided by this Court.

Respondents have contended that the Federal Power Commission is without jurisdiction over the sales involved under Section 201(b) of the Federal Power Act, for the reason that any possible federal jurisdiction of interstate wholesale sales of electric energy generated at Hoover Dam was vested in the Secretary of the Interior under Section 6 of the Boulder Canyon Project Act of 1928. This point was pretermitted by the court below in footnote 2 of the opinion (F. P. C. Pet. for Cert., App. A, p. 20). The point was resolved in petitioner's favor by the Federal Power Commission; but since a decision in favor of respondent would support the judgment of the court below, the determination of the issue by this Court is within the Court's jurisdiction. *Langnes* v. *Green*, 282 U. S. 531, 536-537. The issue is one purely of law appropriate for this Court's determination. *cf. O'Leary* v. *Brown-Pacific-Maxon*, 340 U. S. 504, 508, where the Court even undertook to dispose of a purely factual issue in order to dispose of the entire case.

The argument that Section 6 of the Boulder Canyon Project Act establishes a white area in what would otherwise be the national scope of the Federal Power Act overlooks that the Federal Power Act came some seven years after the Boulder Canyon Project Act. It overlooks the scope which Congress intended of Section 201(b) of the Federal Power Act. The relationship of Section 6 of the Boulder Canyon Project Act to Part II of the Federal Power Act is the same as the relationship of Part I of the Federal Power Act to Part II described by this Court in *United States* v. *Public Utilities Commission*, 345 U. S. 295,

300-311 (1953). The importance of a definitive determination of the scope of the Federal Power Act is well covered in the Federal Power Commission petition for certiorari.

Conclusion

The writ should be granted and the determination below summarily reversed on the issue decided by the court below in the face of the clear conflict between the decision of the court below and that of this Court. Summary reversal is warranted not only because of the clear repudiation of this Court's opinion, but because of the urgent need of petitioner and its consumers for the earliest possible relief from the financial burden of exorbitant rates. In the event there is no summary reversal, the full scope of Section 201(b) of the Federal Power Act, taking into account its effect on the earlier Section 6 of the Boulder Canyon Project Act, should be inquired into.

Respectfully submitted,

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APPENDIX A

Boulder Canyon Project Act of 1928, 45 Stat. 1057, 1061-1062, 43 U. S. C. § 617(e).

* * * * * * * *

SEC. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act or penalizing failure to comply with such regulations or with the provisions of

this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California until this Act shall become effective as provided in section 4 herein.